

APPENDIX D-1

Clauses for Subcontracts in Excess of \$500,000

Effective: November 1, 2003

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Clause 1. SUBCONTRACT PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA (OCT 1997)

Derived from FAR 52.215-10

(Applies to subcontracts exceeding \$550,000 where cost or pricing data is required.)

- A. If any price, including profit or fee, negotiated in connection with this subcontract, or any cost reimbursable under this subcontract, was increased by any significant amount because-
 - 1. The Subcontractor or a lower-tier subcontractor furnished cost or pricing data that were not complete, accurate, and current as certified in its Certificate of Current Cost or Pricing Data;
 - 2. A lower-tier subcontractor or prospective lower-tier subcontractor furnished the Subcontractor cost or pricing data that were not complete, accurate, and current as certified in the Subcontractor's Certificate of Current Cost or Pricing Data; or
 - 3. Any of these parties furnished data of any description that were not accurate, the price or cost shall be reduced accordingly and the subcontract shall be modified to reflect the reduction.
- B. Any reduction in the subcontract price under paragraph (A) of this clause due to defective data from a prospective lower-tier subcontractor that was not subsequently awarded the lower-tier subcontract shall be limited to the amount, plus applicable overhead and profit markup, by which-
 - 1. The actual lower-tier subcontract; or
 - 2. The actual cost to the Subcontractor, if there was no lower-tier subcontract, was less than the prospective lower-tier subcontract cost estimate submitted by the Subcontractor; provided, that the actual lower-tier subcontract price was not itself affected by defective cost or pricing data.
- C.
 - 1. If the NREL Subcontract Administrator determines under paragraph (A) of this clause that a price or cost reduction should be made, the Subcontractor agrees not to raise the following matters as a defense:
 - (i) The Subcontractor or lower-tier subcontractor was a sole source supplier or otherwise was in a superior bargaining position and thus the price of the subcontract would not have been modified even if accurate, complete, and current cost or pricing data had been submitted.
 - (ii) The NREL Subcontract Administrator should have known that the cost or pricing data in issue were defective even though the Subcontractor or lower-tier subcontractor took no affirmative action to bring the character of the data to the attention of the NREL Subcontract Administrator.
 - (iii) The subcontract was based on an agreement about the total cost of the subcontract and there was no agreement about the cost of each item procured under the subcontract.
 - (iv) The Subcontractor or lower-tier subcontractor did not submit a Certificate of Current Cost or Pricing Data.
 - 2. (i) Except as prohibited by subdivision (C) (2) (ii) of this clause, an offset in an amount determined appropriate by the NREL Subcontract Administrator based upon the facts shall be allowed against the amount of a subcontract price reduction if—
 - (a) The Subcontractor certifies to the NREL Subcontract Administrator that, to the best of the Subcontractor's knowledge and belief, the Subcontractor is entitled to the offset in the amount requested; and

- (b) The Subcontractor proves that the cost or pricing data were available before the "as of" date specified on its Certificate of Current Cost or Pricing Data, and that the data were not submitted before such date.
 - (ii) An offset shall not be allowed if—
 - (a) The understated data were known by the Subcontractor to be understated before the "as of" date specified on its Certificate of Current Cost or Pricing Data; or
 - (b) The NREL/Government proves that the facts demonstrate that the subcontract price would not have increased in the amount to be offset even if the available data had been submitted before the "as of" date specified on its Certificate of Current Cost or Pricing Data.
- D. If any reduction in the subcontract price under this clause reduces the price of items for which payment was made prior to the date of the modification reflecting the price reduction, the Subcontractor shall be liable to and shall pay the NREL/Government at the time such overpayment is repaid—
 - 1. Simple interest on the amount of such overpayment to be computed from the date(s) of overpayment to the Subcontractor to the date NREL/Government is repaid by the Subcontractor at the applicable underpayment rate effective for each quarter prescribed by the Secretary of the Treasury under 26 U.S.C. 6621(a)(2); and
 - 2. A penalty equal to the amount of the overpayment, if the Subcontractor or lower-tier subcontractor knowingly submitted cost or pricing data that were incomplete, inaccurate, or noncurrent.

Clause 2. SUBCONTRACT PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA--MODIFICATIONS (OCT 1997)

Derived from FAR 52.215-11

(Applies when a modification to the subcontract involving a pricing adjustment (both increases and decreases) is expected to exceed \$550,000, thereby requiring the Subcontractor to submit cost or pricing data, whether or not cost or pricing data were initially required.)

- A. This clause shall become operative only for any modification to this subcontract involving a pricing adjustment expected to exceed the threshold for submission of cost or pricing data at FAR 15.403-4, except that this clause does not apply to any modification if an exception under FAR 15.403-1 applies.
- B. If any price, including profit or fee, negotiated in connection with any modification under this clause, or any cost reimbursable under this subcontract, was increased by any significant amount because (1) the Subcontractor or a lower-tier subcontractor furnished cost or pricing data that were not complete, accurate, and current as certified in its Certificate of Current Cost or Pricing Data, (2) a lower-tier subcontractor or prospective lower-tier subcontractor furnished the Subcontractor cost or pricing data that were not complete, accurate, and current as certified in the Subcontractor's Certificate of Current Cost or Pricing Data, or (3) any of these parties furnished data of any description that were not accurate, the price or cost shall be reduced accordingly and the subcontract shall be modified to reflect the reduction. This right to a price reduction is limited to that resulting from defects in data relating to modifications for which this clause becomes operative under paragraph (A) of this clause.
- C. Any reduction in the subcontract price under paragraph (B) of this clause due to defective data from a prospective lower-tier subcontractor that was not subsequently awarded the lower-tier subcontract shall be limited to the amount, plus applicable overhead and profit markup, by which-

1. The actual lower-tier subcontract; or
 2. The actual cost to the Subcontractor, if there was no lower-tier subcontract, was less than the prospective lower-tier subcontract cost estimate submitted by the Subcontractor; provided, that the actual lower-tier subcontract price was not itself affected by defective cost or pricing data.
- D. 1. If the NREL Subcontract Administrator determines under paragraph (B) of this clause that a price or cost reduction should be made, the Subcontractor agrees not to raise the following matters as a defense:
- (i) The Subcontractor or lower-tier subcontractor was a sole source supplier or otherwise was in a superior bargaining position and thus the price of the subcontract would not have been modified even if accurate, complete, and current cost or pricing data had been submitted.
 - (ii) The NREL Subcontract Administrator should have known that the cost or pricing data in issue were defective even though the Subcontractor or lower-tier subcontractor took no affirmative action to bring the character of the data to the attention of the NREL Subcontract Administrator.
 - (iii) The subcontract was based on an agreement about the total cost of the subcontract and there was no agreement about the cost of each item procured under the subcontract.
 - (iv) The Subcontractor or lower-tier subcontractor did not submit a Certificate of Current Cost or Pricing Data.
2. (i) Except as prohibited by paragraph (D) (2) (ii) of this clause, an offset in an amount determined appropriate by the NREL Subcontract Administrator based upon the facts shall be allowed against the amount of a subcontract price reduction if-
- (a) The Subcontractor certifies to the NREL Subcontract Administrator that, to the best of the Subcontractor's knowledge and belief, the Subcontractor is entitled to the offset in the amount requested; and
 - (b) The Subcontractor proves that the cost or pricing data were available before the "as of" date specified on its Certificate of Current Cost or Pricing Data, and that the data were not submitted before such date.
- (ii) An offset shall not be allowed if-
- (a) The understated data were known by the Subcontractor to be understated before the "as of" date specified on its Certificate of Current Cost or Pricing Data; or
 - (b) The NREL/Government proves that the facts demonstrate that the subcontract price would not have increased in the amount to be offset even if the available data had been submitted before the "as of" date specified on its Certificate of Current Cost or Pricing Data.
- E. If any reduction in the subcontract price under this clause reduces the price of items for which payment was made prior to the date of the modification reflecting the price reduction, the Subcontractor shall be liable to and shall pay NREL/Government at the time such overpayment is repaid-
1. Simple interest on the amount of such overpayment to be computed from the date(s) of overpayment to the Subcontractor to the date the NREL/Government is repaid by the Subcontractor at the applicable underpayment rate effective for each quarter prescribed by the Secretary of the Treasury under 26U.S.C. 6621(a)(2); and

2. A penalty equal to the amount of the overpayment, if the Subcontractor or lower-tier subcontractor knowingly submitted cost or pricing data that were incomplete, inaccurate, or noncurrent.

Clause 3. LOWER-TIER SUBCONTRACTOR COST OR PRICING DATA (OCT 1997)

Derived from FAR 52.215-12 (FD)

(Applies to subcontracts where the clause entitled “Subcontract Price Reduction for Defective Cost or Pricing Data” is included and any lower-tier subcontract is expected to exceed \$550,000, thereby requiring the lower-tier subcontractor to submit cost or pricing data.)

- A. Before awarding any lower-tier subcontract expected to exceed the threshold for submission of cost or pricing data at FAR 15.403-4, on the date of agreement on price or the date of award, whichever is later; or before pricing any lower-tier subcontract modification involving a pricing adjustment expected to exceed the threshold for submission of cost or pricing data at FAR 15.403-4, the Subcontractor shall require the lower-tier subcontractor to submit cost or pricing data (actually or by specific identification in writing), unless an exception under FAR 15.403-1 applies.
- B. The Subcontractor shall require the lower-tier subcontractor to certify in substantially the form prescribed in FAR 15.406-2 that, to the best of its knowledge and belief, the data submitted under paragraph (A) of this clause were accurate, complete, and current as of the date of agreement on the negotiated price of the lower-tier subcontract or lower-tier subcontract modification.
- C. In each lower-tier subcontract that exceeds the threshold for submission of cost or pricing data at FAR 15.403-4, when entered into, the Subcontractor shall insert either-
 1. The substance of this clause, including this paragraph (C), if paragraph (A) of this clause requires submission of cost or pricing data for the subcontract; or
 2. The substance of the clause at FAR 52.215-13, Lower-tier Subcontractor Cost or Pricing Data-Modifications.

Clause 4. LOWER-TIER SUBCONTRACTOR COST OR PRICING DATA -- MODIFICATIONS (OCT 1997)

Derived from FAR 52.215-13 (FD)

(Applies to subcontracts where the clause entitled “Subcontract Price Reduction for Defective Cost or Pricing Data-Modifications” is included. And, applies to a Subcontractor’s lower-tier subcontract modification involving a pricing adjustment (both increases and decreases) that is expected to exceed \$550,000, thereby requiring the lower-tier subcontractor to submit cost or pricing data, whether or not cost or pricing data were initially required.)

- A. The requirements of paragraphs (B) and (C) of this clause shall-
 1. Become operative only for any modification to a lower-tier subcontract under this subcontract involving a pricing adjustment expected to exceed the threshold for submission of cost or pricing data at FAR 15.403-4; and
 2. Be limited to such modifications to a lower-tier subcontract.
- B. Before awarding any lower-tier subcontract expected to exceed the threshold for submission of cost or pricing data at FAR 15.403-4, on the date of agreement on price or the date of award, whichever is later; or before pricing any lower-tier subcontract modification involving a pricing adjustment expected to exceed the threshold for submission of cost or pricing data at FAR 15.403-4, the Subcontractor shall require the lower-tier subcontractor to submit cost or pricing data (actually or by specific identification in writing), unless an exception under FAR 15.403-1 applies.

- C. The Subcontractor shall require the lower-tier subcontractor to certify in substantially the form prescribed in FAR 15.406-2 that, to the best of its knowledge and belief, the data submitted under paragraph (B) of this clause were accurate, complete, and current as of the date of agreement on the negotiated price of the lower-tier subcontract or lower-tier subcontract modification.
- D. The Subcontractor shall insert the substance of this clause, including this paragraph (D), in each lower-tier subcontract that exceeds the threshold for submission of cost or pricing data at FAR 15.403-4 on the date of agreement on price or the date of award, whichever is later.

Clause 5. LOWER-TIER SUBCONTRACTOR'S CERTIFICATE OF CURRENT COST OR PRICING DATA (OCT 1997)

Derived from FAR 15.406-2 (FD)

(Applies to subcontracts where any lower-tier subcontract is expected to exceed \$550,000, thereby requiring the lower-tier subcontractor to submit cost or pricing data.)

- A. When cost or pricing data are required, the NREL Subcontractor must require the lower-tier subcontractor to execute a Certificate of Current Cost or Pricing Data, using the format in this paragraph, and must provide a copy of the executed certificate to the NREL Subcontract Administrator.

Certificate of Current Cost or Pricing Data

This is to certify that, to the best of my knowledge and belief, the cost or pricing data (as defined in section 2.101 of the Federal Acquisition Regulation (FAR) and required under FAR subsection 15.403-4) submitted, either actually or by specific identification in writing, to the NREL Subcontractor or to the NREL Subcontractor's representative in support of the NREL Subcontractor's _____* are accurate, complete, and current as of _____**. This certification includes the cost or pricing data supporting any advance agreements and forward pricing rate agreements between the lower-tier subcontract offeror and the NREL Subcontractor that are part of the proposal.

Firm _____

Signature _____

Name _____

Title _____

Date of execution*** _____

* Identify the NREL proposal or NREL subcontract, request for price adjustment, or other submission involved, giving the appropriate identifying number (e.g., NREL RFP No.).

**Insert the day, month, and year when price negotiations were concluded and price agreement was reached or, if applicable, an earlier date agreed upon between the parties that is as close as practicable to the date of agreement on price.

*** Insert the day, month, and year of signing, which should be as close as practicable to the date when the price negotiations were concluded and the contract price was agreed to.

[End of certificate]

- B. The certificate does not constitute a representation as to the accuracy of the lower-tier subcontractor's judgment on the estimate of future costs or projections. It applies to the data upon which the judgment or estimate was based. This distinction between fact and judgment should be

clearly understood. If the lower-tier subcontractor had information reasonably available at the time of agreement showing that the negotiated price was not based on accurate, complete, and current data, the lower-tier subcontractor's responsibility is not limited by any lack of personal knowledge of the information on the part of its negotiators.

- C. The NREL Subcontractor and lower-tier subcontractor are encouraged to reach a prior agreement on criteria for establishing closing or cutoff dates when appropriate in order to minimize delays associated with proposal updates. Closing or cutoff dates should be included as part of the data submitted with the proposal and, before agreement on price, data should be updated by the lower-tier subcontractor to the latest closing or cutoff dates for which the data are available. Use of cutoff dates coinciding with reports is acceptable, as certain data may not be reasonably available before normal periodic closing dates (e.g., actual indirect costs). Data within the lower-tier subcontractor's or any tier of subcontractor's organization on matters significant to lower-tier subcontractor management and to the NREL Subcontractor will be treated as reasonably available. What is significant depends upon the circumstances of each acquisition.
- D. Possession of a Certificate of Current Cost or Pricing Data is not a substitute for examining and analyzing the lower-tier subcontractor's proposal.
- E. If cost or pricing data are requested by the NREL Subcontractor and submitted by a lower-tier subcontract offeror, but an exception is later found to apply, the data shall not be considered cost or pricing data and shall not be certified in accordance with this section.

**Clause 6. SMALL BUSINESS (LOWER-TIER) SUBCONTRACTING PLAN (JAN 2002)
INCORPORATING ALTERNATE II (OCT 2001)**

Derived from FAR 52.219-9 (FD)

(Applies to subcontracts exceeding \$500,000 with lower-tier subcontracting possibilities or subcontracts exceeding \$1,000,000 for construction of any public facility.)

- A. This clause does not apply to small business concerns.
- B. Definitions. As used in this clause—

"Commercial item" means a product or service that satisfies the definition of commercial item in section 2.101 of the Federal Acquisition Regulation.

"Commercial plan" means a lower-tier subcontracting plan (including goals) that covers the offeror's fiscal year and that applies to the entire production of commercial items sold by either the entire company or a portion thereof (e.g., division, plant, or product line).

"Individual lower-tier subcontract plan" means a lower-tier subcontracting plan that covers the entire subcontract period (including option periods), applies to a specific subcontract, and has goals that are based on the offeror's planned lower-tier subcontracting in support of the specific subcontract except that indirect costs incurred for common or joint purposes may be allocated on a prorated basis to the subcontract.

"Master plan" means a lower-tier subcontracting plan that contains all the required elements of an individual lower-tier subcontract plan, except goals, and may be incorporated into individual lower-tier subcontract plans, provided the master plan has been approved.

"Lower-tier subcontract" means any agreement (other than one involving an employer-employee relationship) entered into by an NREL Subcontractor calling for supplies or services required for performance of the subcontract or a lower-tier subcontract.

- C. Proposals submitted in response to this solicitation shall include a lower-tier subcontracting plan, that separately addresses lower-tier subcontracting with small business, veteran-owned small

business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns. If the offeror is submitting an individual lower-tier subcontract plan, the plan must separately address lower-tier subcontracting with small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns with a separate part for the basic subcontract and separate parts for each option (if any). The plan shall be included in and made a part of the resultant subcontract. The lower-tier subcontracting plan shall be negotiated within the time specified by the NREL Subcontract Administrator. Failure to submit and negotiate a lower-tier subcontracting plan shall make the offeror ineligible for award of a subcontract.

- D. The offeror's lower-tier subcontracting plan shall include the following:
1. Goals, expressed in terms of percentages of total planned lower-tier subcontracting dollars, for the use of small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns as lower-tier subcontractors. The offeror shall include all lower-tier subcontracts that contribute to subcontract performance, and may include a proportionate share of products and services that are normally allocated as indirect costs.
 2. A statement of –
 - (i) Total dollars planned to be subcontracted to lower-tiers for an individual lower-tier subcontract plan; or the offeror's total projected sales, expressed in dollars, and the total value of projected lower-tier subcontracts to support the sales for a commercial plan;
 - (ii) Total dollars planned to be subcontracted to lower-tier small business concerns;
 - (iii) Total dollars planned to be subcontracted to lower-tier veteran-owned small business concerns;
 - (iv) Total dollars planned to be subcontracted to lower-tier service-disabled veteran-owned small business;
 - (v) Total dollars planned to be subcontracted to lower-tier HUBZone small business concerns;
 - (vi) Total dollars planned to be subcontracted to lower-tier small disadvantaged business concerns; and
 - (vii) Total dollars planned to be subcontracted to lower-tier women-owned small business concerns.
 3. A description of the principal types of supplies and services to be subcontracted to lower-tiers, and an identification of the types planned for lower-tier subcontracting to –
 - (i) Small business concerns;
 - (ii) Veteran-owned small business concerns;
 - (iii) Service-disabled veteran-owned small business concerns;
 - (iv) HUBZone small business concerns;
 - (v) Small disadvantaged business concerns, and
 - (vi) Women-owned small business concerns.
 4. A description of the method used to develop the lower-tier subcontracting goals in paragraph (D)(1) of this clause.

5. A description of the method used to identify potential sources for solicitation purposes (e.g., existing company source lists, the Procurement Marketing and Access Network (PRO-Net) of the Small Business Administration (SBA), veterans service organizations, the National Minority Purchasing Council Vendor Information Service, the Research and Information Division of the Minority Business Development Agency in the Department of Commerce, or small, HUBZone, small disadvantaged, and women-owned small business trade associations). A firm may rely on the information contained in PRO-Net as an accurate representation of a concern's size and ownership characteristics for the purposes of maintaining a small, veteran-owned small, service-disabled veteran-owned small, HUBZone small, small disadvantaged, and women-owned small business source list. Use of PRO-Net as its source list does not relieve a firm of its responsibilities (e.g., outreach, assistance, counseling, or publicizing lower-tier subcontracting opportunities) in this clause.
6. A statement as to whether or not the offeror included indirect costs in establishing lower-tier subcontracting goals, and a description of the method used to determine the proportionate share of indirect costs to be incurred with –
 - (i) Small business concerns;
 - (ii) Veteran-owned small business concerns;
 - (iii) Service-disabled veteran-owned small business concerns;
 - (iv) HUBZone small business concerns;
 - (v) Small disadvantaged business concerns; and
 - (vi) Women-owned small business concerns.
7. The name of the individual employed by the offeror who will administer the offeror's lower-tier subcontracting program, and a description of the duties of the individual.
8. A description of the efforts the offeror will make to assure that small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns have an equitable opportunity to compete for lower-tier subcontracts.
9. Assurances that the offeror will include the clause of this subcontract entitled "Utilization of Small Business Concerns" in all lower-tier subcontracts that offer sub-tier subcontracting opportunities, and that the offeror will require all lower-tier subcontractors (except small business concerns) that receive lower-tier subcontracts in excess of \$500,000 (\$1,000,000 for construction of any public facility) to adopt a plan similar to the plan that complies with the requirements of this clause.
10. Assurances that the offeror will –
 - (i) Cooperate in any studies or surveys as may be required;
 - (ii) Submit periodic reports so that NREL/Government can determine the extent of compliance by the offeror with the lower-tier subcontracting plan;
 - (iii) Submit Standard Form (SF) 294, (Lower-tier) Subcontracting Report for Individual (Sub)Contracts, and/or SF 295, Summary (Lower-Tier) Subcontract Report, in accordance with the paragraph (J) of this clause. The reports shall provide information on lower-tier subcontract awards to small business concerns, veteran-owned small business concerns, service-disabled veteran-owned small business concerns, HUBZone small business concerns, small disadvantaged business concerns, women-owned small business concerns, and Historically Black Colleges and Universities and Minority Institutions.

Reporting shall be in accordance with the instructions on the forms or as provided in agency regulations.

- (iv) Ensure that its lower-tier subcontractors agree to submit SF 294 and 295.
11. A description of the types of records that will be maintained concerning procedures that have been adopted to comply with the requirements and goals in the plan, including establishing source lists; and a description of the offeror's efforts to locate small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns and award lower-tier subcontracts to them. The records shall include at least the following (on a plant-wide or company-wide basis, unless otherwise indicated):
- (i) Source lists (e.g., PRO-Net), guides, and other data that identify small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns.
 - (ii) Organizations contacted in an attempt to locate sources that are small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, or women-owned small business concerns.
 - (iii) Records on each lower-tier subcontract solicitation resulting in an award of more than \$100,000, indicating –
 - (a) Whether small business concerns were solicited and if not, why not;
 - (b) Whether veteran-owned small business concerns were solicited and, if not, why not;
 - (c) Whether service-disabled veteran-owned small business concerns were solicited and, if not, why not;
 - (d) Whether HUBZone small business concerns were solicited and, if not, why not;
 - (e) Whether small disadvantaged business concerns were solicited and if not, why not;
 - (f) Whether women-owned small business concerns were solicited and if not, why not; and
 - (g) If applicable, the reason award was not made to a small business concern.
 - (iv) Records of any outreach efforts to contact –
 - (a) Trade associations;
 - (b) Business development organizations;
 - (c) Conferences and trade fairs to locate small, HUBZone small, small disadvantaged, and women-owned small business sources; and
 - (d) Veterans service organizations.
 - (v) Records of internal guidance and encouragement provided to buyers through –
 - (a) Workshops, seminars, training, etc., and
 - (b) Monitoring performance to evaluate compliance with the program's requirements.
 - (vi) On a subcontract-by-subcontract basis, records to support award data submitted by the offeror to NREL/Government, including the name, address, and business size of each lower-tier subcontractor. Subcontractors having commercial plans need not comply with this requirement.

- E. In order to effectively implement this plan to the extent consistent with efficient subcontract performance, the Subcontractor shall perform the following functions:
1. Assist small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns by arranging solicitations, time for the preparation of bids, quantities, specifications, and delivery schedules so as to facilitate the participation by such concerns. Where the Subcontractor's lists of potential small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business lower-tier subcontractors are excessively long, reasonable effort shall be made to give all such small business concerns an opportunity to compete over a period of time.
 2. Provide adequate and timely consideration of the potentialities of small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns in all "make-or-buy" decisions.
 3. Counsel and discuss lower-tier subcontracting opportunities with representatives of small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business firms.
 4. Provide notice to lower-tier subcontractors concerning penalties and remedies for misrepresentations of business status as small, veteran-owned small business, HUBZone small, small disadvantaged or women-owned small business for the purpose of obtaining a lower-tier subcontract that is to be included as part or all of a goal contained in the Subcontractor's lower-tier subcontracting plan.
- F. A master plan on a plant or division-wide basis that contains all the elements required by paragraph (D) of this clause, except goals, may be incorporated by reference as a part of the lower-tier subcontracting plan required of the offeror by this clause; provided –
1. The master plan has been approved;
 2. The offeror ensures that the master plan is updated as necessary and provides copies of the approved master plan, including evidence of its approval, to the NREL Subcontract Administrator; and
 3. Goals and any deviations from the master plan deemed necessary by the NREL Subcontract Administrator to satisfy the requirements of this subcontract are set forth in the individual lower-tier subcontracting plan.
- G. A commercial plan is the preferred type of lower-tier subcontracting plan for contractors furnishing commercial items. The commercial plan shall relate to the offeror's planned lower-tier subcontracting generally, for both commercial and NREL/Government business, rather than solely to the NREL subcontract. Commercial plans are also preferred for lower-tier subcontractors that provide commercial items under an NREL subcontract, whether or not the Subcontractor is supplying a commercial item.
- H. Prior compliance of the offeror with other such lower-tier subcontracting plans under previous subcontracts will be considered by the NREL Subcontract Administrator in determining the responsibility of the offeror for award of the subcontract.
- I. The failure of the Subcontractor or lower-tier subcontractor to comply in good faith with –
1. The clause of this subcontract entitled "Utilization Of Small Business Concerns;" or

2. An approved plan required by this clause, shall be a material breach of the subcontract.

J. The Subcontractor shall submit the following reports:

1. Standard Form 294, (Lower-Tier) Subcontracting Report for Individual (Sub)Contracts. This report shall be submitted to the NREL Subcontract Administrator semiannually and at subcontract completion. The report covers lower-tier subcontract award data related to this subcontract. This report is not required for commercial plans.
2. Standard Form 295, Summary (Lower-Tier) Subcontract Report. This report encompasses all the subcontracts with NREL/Government. It must be submitted semi-annually for subcontracts with the Department of Defense and annually for subcontracts with civilian agencies and NREL. If the reporting activity is covered by a commercial plan, the reporting activity must report annually all lower-tier subcontract awards under that plan. All reports submitted at the close of each fiscal year (both individual and commercial plans) shall include a breakout, in the Subcontractor's format, of lower-tier subcontract awards, in whole dollars, to small disadvantaged business concerns by North American Industry Classification System (NAICS) Industry Subsector. For a commercial plan, the Subcontractor may obtain from each of its lower-tier subcontractors a predominant NAICS Industry Subsector and report all awards to that lower-tier subcontractor under its predominant NAICS Industry Subsector.

Clause 7. LIQUIDATED DAMAGES – LOWER-TIER SUBCONTRACTING PLAN (JAN 1999)

Derived from FAR 52.219-16 (FD)

(Applies to subcontracts that exceed \$500,000 where the clause “Small Business (Lower-Tier) Subcontracting Plan” is applicable.)

- A. “Failure to make a good faith effort to comply with the lower-tier subcontracting plan”, as used in this clause, means a willful or intentional failure to perform in accordance with the requirements of the lower-tier subcontracting plan approved under the clause in this subcontract entitled “Small Business (Lower-tier) Subcontracting Plan,” or willful or intentional action to frustrate the plan.
- B. Performance shall be measured by applying the percentage goals to the total actual lower-tier subcontracting dollars or, if a commercial plan is involved, to the pro rata share of actual lower-tier subcontracting dollars attributable to NREL/Government subcontracts covered by the commercial plan. If, at subcontract completion or, in the case of a commercial plan, at the close of the fiscal year for which the plan is applicable, the Subcontractor has failed to meet its lower-tier subcontracting goals and the NREL Subcontract Administrator decides in accordance with paragraph (C) of this clause that the Subcontractor failed to make a good faith effort to comply with its lower-tier subcontracting plan, established in accordance with the clause in this subcontract entitled “Small Business (Lower-tier) Subcontracting Plan,” the Subcontractor shall pay NREL/Government liquidated damages in an amount stated. The amount of probable damages attributable to the Subcontractor’s failure to comply shall be an amount equal to the actual dollar amount by which the Subcontractor failed to achieve each lower-tier subcontract goal.
- C. Before the NREL Subcontract Administrator makes a final decision that the Subcontractor has failed to make such good faith effort, the NREL Subcontract Administrator shall give the Subcontractor written notice specifying the failure and permitting the Subcontractor to demonstrate what good faith efforts have been made and to discuss the matter. Failure to respond to the notice may be taken as an admission that no valid explanation exists. If, after consideration of all the pertinent data, the NREL Subcontract Administrator finds that the Subcontractor failed to make a good faith effort to comply with the lower-tier subcontracting plan, the NREL

Subcontract Administrator shall issue a final decision to that effect and require that the Subcontractor pay NREL/Government liquidated damages as provided in paragraph (B) of this clause.

- D. With respect to commercial plans, the Contracting Officer who approved the plan will perform the functions of the NREL Subcontract Administrator under this clause on behalf of NREL subcontracts and all agencies with contracts covered by the commercial plan.
- E. The Subcontractor shall have the right of appeal, under the clause in this subcontract entitled, Disputes, from any final decision of the NREL Subcontract Administrator.
- F. Liquidated damages shall be in addition to any other remedies that NREL/ Government may have.

Clause 8. COST ACCOUNTING STANDARDS (APR 1998)

Derived from FAR 52.230-2

(Applies to all subcontracts (except subcontracts with Educational Institutions) exceeding \$500,000 unless the subcontract is subject to modified CAS coverage under 48 CFR 9903.201-2, and except subcontracts exempt under 48 CFR 9903.201-1, such exemptions include, but are not limited to: firm fixed price subcontracts awarded on the basis of adequate price competition without submission of cost or pricing data; subcontracts with small businesses; and subcontracts for commercial items.)

- A. Unless the subcontract is exempt under 48 CFR 9903.201-1 and 9903.201-2, the provisions of 48 CFR Part 9903 are incorporated herein by reference and the Subcontractor, in connection with this subcontract, shall --
 - 1. (CAS-covered Contracts Only) By submission of a Disclosure Statement, disclose in writing the Subcontractor's cost accounting practices as required by 48 CFR 9903.202-1 through 9903.202-5, including methods of distinguishing direct costs from indirect costs and the basis used for allocating indirect costs. The practices disclosed for this subcontract shall be the same as the practices currently disclosed and applied on all other subcontracts and lower-tier subcontracts being performed by the Subcontractor and which contain a Cost Accounting Standards (CAS) clause. If the Subcontractor has notified the NREL Subcontract Administrator that the Disclosure Statement contains trade secrets and commercial or financial information which is privileged and confidential, the Disclosure Statement shall be protected and shall not be released outside of NREL/Government.
 - 2. Follow consistently the Subcontractor's cost accounting practices in accumulating and reporting subcontract performance cost data concerning this subcontract. If any change in cost accounting practices is made for the purposes of any subcontract or lower-tier subcontract subject to CAS requirements, the change must be applied prospectively to this subcontract and the Disclosure Statement must be amended accordingly. If the subcontract price or cost allowance of this subcontract is affected by such changes, adjustment shall be made in accordance with subparagraph (A)(4) or (A)(5) of this clause, as appropriate.
 - 3. Comply with all CAS, including any modifications and interpretations indicated thereto contained in 48 CFR Part 9904, in effect on the date of award of this subcontract or, if the Subcontractor has submitted cost or pricing data, on the date of final agreement on price as shown on the Subcontractor's signed certificate of current cost or pricing data. The Subcontractor shall also comply with any CAS (or modifications to CAS), which hereafter become applicable to a subcontract or lower-tier subcontract of the Subcontractor. Such compliance shall be required prospectively from the date of applicability to such subcontract or lower-tier subcontract.

4. (i) Agree to an equitable adjustment as provided in the Changes clause of this subcontract if the subcontract cost is affected by a change which, pursuant to subparagraph (A)(3) of this clause, the Subcontractor is required to make to the Subcontractor's established cost accounting practices.
 - (ii) Negotiate with the NREL Subcontract Administrator to determine the terms and conditions under which a change may be made to a cost accounting practice, other than a change made under other provisions of subparagraph (A)(4) of this clause; provided that no agreement may be made under this provision that will increase costs paid by NREL/Government.
 - (iii) When the parties agree to a change to a cost accounting practice, other than a change under subdivision (A)(4)(i) of this clause, negotiate an equitable adjustment as provided in the Changes clause of this subcontract.
5. Agree to an adjustment of the subcontract price or cost allowance, as appropriate, if the Subcontractor or a lower-tier subcontractor fails to comply with an applicable Cost Accounting Standard, or to follow any cost accounting practice consistently and such failure results in any increased costs paid by NREL/Government. Such adjustment shall provide for recovery of the increased costs to NREL/Government, together with interest thereon computed at the annual rate established under section 6621 of the Internal Revenue Code of 1986 (26 U.S.C. 6621) for such period, from the time the payment by the NREL/Government was made to the time the adjustment is effected. In no case shall NREL/Government recover costs greater than the increased cost to NREL/Government, in the aggregate, on the relevant subcontracts subject to the price adjustment, unless the Subcontractor made a change in its cost accounting practices of which it was aware or should have been aware at the time of price negotiations and which it failed to disclose to NREL/Government.
- B. If the parties fail to agree whether the Subcontractor or a lower-tier subcontractor has complied with an applicable CAS in 48 CFR 9904 or a CAS rule or regulation in 48 CFR 9903 and as to any cost adjustment demanded by NREL/Government, such failure to agree will constitute a dispute under the Disputes clause of this subcontract.
 - C. The Subcontractor shall permit any authorized representatives of NREL/Government to examine and make copies of any documents, papers, or records relating to compliance with the requirements of this clause.
 - D. The Subcontractor shall include in all negotiated lower-tier subcontracts which the Subcontractor enters into, the substance of this clause, except paragraph (B), and shall require such inclusion in all other subcontracts, of any tier, including the obligation to comply with all CAS in effect on the lower-tier subcontractor's award date or if the lower-tier subcontractor has submitted cost or pricing data, on the date of final agreement on price as shown on the lower-tier subcontractor's signed Certificate of Current Cost or Pricing Data. If the lower-tier subcontract is awarded to a business unit which pursuant to 48 CFR 9903.201-2 is subject to other types of CAS coverage, the substance of the applicable clause set forth in subsection 30.201-4 of the Federal Acquisition Regulation shall be inserted. This requirement shall apply only to negotiated lower-tier subcontracts in excess of \$500,000, except that the requirement shall not apply to negotiated lower-tier subcontracts otherwise exempt from the requirement to include a CAS clause as specified in 48 CFR 9903.201-1.

Clause 9. DISCLOSURE AND CONSISTENCY OF COST ACCOUNTING PRACTICES (APR 1998)

Derived from FAR 52.230-3

(Applies to subcontracts exceeding \$500,000 when the Subcontractor certifies it is eligible for and elects to use modified CAS coverage. For Educational Institutions substitute the relevant sections of 48 CFR 9905.)

- A. The Subcontractor, in connection with this subcontract, shall --
1. Comply with the requirements of 48 CFR 9904.401, Consistency in Estimating, Accumulating, and Reporting Costs; 48 CFR 9904.402, Consistency in Allocating Costs Incurred for the Same Purpose; 48 CFR 9904.405, Accounting for Unallowable Costs; and 48 CFR 9904.406, Cost Accounting Standard -- Cost Accounting Period, in effect on the date of award of this subcontract as indicated in 48 CFR Part 9904.
 2. (CAS-covered Contracts Only) If it is a business unit of a company required to submit a Disclosure Statement, disclose in writing its cost accounting practices as required by 48 CFR 9903.202-1 through 9903.202-5. If the Subcontractor has notified the NREL Subcontract Administrator that the Disclosure Statement contains trade secrets and commercial or financial information which is privileged and confidential, the Disclosure Statement shall be protected and shall not be released outside of the NREL/Government.
 3. (i) Follow consistently the Subcontractor's cost accounting practices. A change to such practices may be proposed, however, by either the NREL/Government or the Subcontractor, and the Subcontractor agrees to negotiate with the NREL Subcontract Administrator the terms and conditions under which a change may be made. After the terms and conditions under which the change is to be made have been agreed to, the change must be applied prospectively to this subcontract, and the Disclosure Statement, if affected, must be amended accordingly.
 - (ii) The Subcontractor shall, when the parties agree to a change to a cost accounting practice and the NREL Subcontract Administrator has made the finding required in 48 CFR 9903.201-6(b), that the change is desirable and not detrimental to the interests of the NREL/Government, negotiate an equitable adjustment as provided in the Changes clause of this subcontract. In the absence of the required finding, no agreement may be made under this subcontract clause that will increase costs paid by NREL/Government.
 4. Agree to an adjustment of the subcontract price or cost allowance, as appropriate, if the Subcontractor or a lower-tier subcontractor fails to comply with the applicable CAS or to follow any cost accounting practice, and such failure results in any increased costs paid by NREL/Government. Such adjustment shall provide for recovery of the increased costs to NREL/Government together with interest thereon computed at the annual rate of interest established under the Internal Revenue Code of 1986 (26 U.S.C. 6621), from the time the payment by NREL/Government States was made to the time the adjustment is effected.
- B. If the parties fail to agree whether the Subcontractor has complied with an applicable CAS, rule, or regulation as specified in 48 CFR 9903 and 9904 and as to any cost adjustment demanded by NREL/Government, such failure to agree will constitute a dispute under the Disputes clause of this subcontract.
- C. The Subcontractor shall permit any authorized representatives of the NREL/Government to examine and make copies of any documents, papers, and records relating to compliance with the requirements of this clause.

- D. The Subcontractor shall include in all negotiated lower-tier subcontracts that the Subcontractor enters into, the substance of this clause, except paragraph (B), and shall require such inclusion in all other subcontracts of any tier, except that --
1. If the lower-tier subcontract is awarded to a business unit which pursuant to 48 CFR 9903.201-2 is subject to other types of CAS coverage, the substance of the applicable clause set forth in subsection 30.201-4 of the Federal Acquisition Regulation shall be inserted.
 2. This requirement shall apply only to negotiated lower-tier subcontracts and negotiated subcontracts at any tier in excess of \$500,000.
 3. The requirement shall not apply to negotiated lower-tier subcontracts otherwise exempt from the requirement to include a CAS clause as specified in 48 CFR 9903.201-1.

Clause 10. CLAUSE - COST ACCOUNTING STANDARDS - EDUCATIONAL INSTITUTION (APR 1998)

Derived from FAR 52.230-5 (FD)

(Applies to all subcontracts with Educational Institutions exceeding \$500,000 unless the subcontract is subject to 48 CFR 9903.201-2, and except subcontracts exempt under 48 CFR 9903.201-1; including, but not limited to firm fixed price subcontracts awarded to an Educational Institution on the basis of adequate price competition without submission of cost or pricing data.)

- A. Unless the subcontract is exempt under 48 CFR 9903.201-1 and 9903.201-2, the provisions of 48 CFR 9903 are incorporated herein by reference and the Subcontractor, in connection with this subcontract, shall --
1. (CAS-covered Subcontracts Only). If a business unit of an educational institution is required to submit a Disclosure Statement, disclose in writing the Subcontractor's cost accounting practices as required by 48 CFR 9903.202-1 through 9903.202-5, including methods of distinguishing direct costs from indirect costs and the basis used for accumulating and allocating indirect costs. The practices disclosed for this subcontract shall be the same as the practices currently disclosed and applied on all other subcontracts and lower-tier subcontracts being performed by the Subcontractor and which contain a Cost Accounting Standards (CAS) clause. If the Subcontractor has notified the NREL Subcontract Administrator that the Disclosure Statement contains trade secrets, and commercial or financial information that is privileged and confidential, the Disclosure Statement shall be protected and shall not be released outside of NREL/Government.
 2. Follow consistently the Subcontractor's cost accounting practices in accumulating and reporting subcontract performance cost data concerning this subcontract. If any change in cost accounting practices is made for the purposes of any subcontract or lower-tier subcontract subject to CAS requirements, the change must be applied prospectively to this subcontract and the Disclosure Statement, if required, must be amended accordingly. If an accounting principle change mandated under Office of Management and Budget (OMB) Circular A-21, Cost Principles for Educational Institutions, requires that a change in the Subcontractor's cost accounting practices be made after the date of this subcontract award, the change must be applied prospectively to this subcontract and the Disclosure Statement, if required, must be amended accordingly. If the subcontract price or cost allowance of this subcontract is affected by such changes, adjustment shall be made in accordance with subparagraph (A)(4) or (A)(5) of this clause, as appropriate.
 3. Comply with all CAS, including any modifications and interpretations indicated thereto contained in 48 CFR 9905 in effect on the date of award of this subcontract or, if the Subcontractor has submitted cost or pricing data, on the date of final agreement on price as shown on the Subcontractor's signed certificate of current cost or pricing data. The

Subcontractor shall also comply with any CAS (or modifications to CAS) which hereafter become applicable to a subcontract or lower-tier subcontract of the Subcontractor. Such compliance shall be required prospectively from the date of applicability to such subcontract or lower-tier subcontract.

4. (i) Agree to an equitable adjustment as provided in the Changes clause of this subcontract if the subcontract cost is affected by a change which, pursuant to subparagraph (A)(3) of this clause, the Subcontractor is required to make to the Subcontractor's established cost accounting practices.
 - (ii) Negotiate with the NREL Subcontract Administrator to determine the terms and conditions under which a change may be made to a cost accounting practice, other than a change made under other provisions of subparagraph (A)(4) of this clause; provided that no agreement may be made under this provision that will increase costs paid by NREL/Government.
 - (iii) When the parties agree to a change to a cost accounting practice, other than a change under subdivision (A)(4)(i), or (A)(4)(iv) of this clause, negotiate an equitable adjustment as provided in the Changes clause of this subcontract.
 - (iv) Agree to an equitable adjustment as provided in the Changes clause of this subcontract, if the subcontract cost is materially affected by an OMB Circular A-21 accounting principle amendment which, on becoming effective after the date of subcontract award, requires the Subcontractor to make a change to the Subcontractor's established cost accounting practices.
 5. Agree to an adjustment of the subcontract price or cost allowance, as appropriate, if he Subcontractor or a lower-tier subcontractor fails to comply with an applicable Cost Accounting Standard, or to follow any cost accounting practice consistently and such failure results in any increased costs paid by NREL/Government. Such adjustment shall provide for recovery of the increased costs to NREL/Government, together with interest thereon computed at the annual rate established under section 6621 of the Internal Revenue Code of 1986 (26 U.S.C. 6621) for such period, from the time the payment by NREL/Government was made to the time the adjustment is effected. In no case shall NREL/Government recover costs greater than the increased cost to NREL/Government, in the aggregate, on the relevant subcontract subject to the price adjustment, unless the Subcontractor made a change in its cost accounting practices of which it was aware or should have been aware at the time of price negotiations and which it failed to disclose to NREL/Government.
- B. If the parties fail to agree whether the Subcontractor or a lower-tier subcontractor has complied with an applicable CAS or a CAS rule or regulation in 48 CFR 9903 and as to any cost adjustment demanded by NREL/Government, such failure to agree will constitute a dispute under the Disputes clause of this subcontract.
 - C. The Subcontractor shall permit any authorized representatives of NREL/Government to examine and make copies of any documents, papers, or records relating to compliance with the requirements of this clause.
 - D. The Subcontractor shall include in all negotiated lower-tier subcontracts which the Subcontractor enters into, the substance of this clause, except paragraph (B), and shall require such inclusion in all other subcontracts, of any tier, including the obligation to comply with all applicable CAS in effect on the lower-tier subcontractor's award date or, if the lower-tier subcontractor has submitted cost or pricing data, on the date of final agreement on price as shown on the lower-tier subcontractor's signed Certificate of Current Cost or Pricing Data, except that --

1. If the lower-tier subcontract is awarded to a business unit which pursuant to 48 CFR 9903.201-2 is subject to other types of CAS coverage, the substance of the applicable clause set forth in 48 CFR 9903.201-4 shall be inserted;
2. This requirement shall apply only to negotiated lower-tier subcontracts or subcontracts at any tier in excess of \$500,000; and
3. The requirement shall not apply to negotiated lower-tier subcontracts otherwise exempt from the requirement to include a CAS clause as specified in 48 CFR 9903.201-1.

Clause 11. DISPLACED EMPLOYEE HIRING PREFERENCE (JUNE 1997)

Derived from DEAR 952.226-74 (FD)

(Applies to all subcontracts exceeding \$500,000, except subcontracts for commercial items.)

A. Definition.

Eligible employee means a current or former employee of a Contractor or subcontractor employed at a Department of Energy Defense Nuclear Facility (1) whose position of employment has been, or will be, involuntarily terminated (except if terminated for cause), (2) who has also met the eligibility criteria contained in the Department of Energy guidance for Contractor work force restructuring, as may be amended or supplemented from time to time, and (3) who is qualified for a particular job vacancy with the Department or one of its Contractors or subcontractors with respect to work under its Contract with the Department at the time the particular position is available.

- B. Consistent with Department of Energy guidance for Contractor work force restructuring, as may be amended or supplemented from time to time, the Subcontractor agrees that it will provide a preference in hiring to an eligible employee to the extent practicable for work performed under this subcontract.
- C. The requirements of this clause shall be included in subcontracts at any tier (except for lower-tier subcontracts for commercial items pursuant to 41 U.S.C. 403) expected to exceed \$500,000.

Clause 12. COSTS ASSOCIATED WITH WHISTLEBLOWER ACTION (SPECIAL) (MAY 2003)

Derived from DEAR 931.205-47 (OCT 2000) (H-3) (FD)

(Applies to subcontracts exceeding \$5,000,000 where the subcontract work directly relates to activities at DOE-owned or -leased facilities and the clause "Whistleblower Protection for Subcontractor Employees" is applicable.)

A. Costs Associated with Whistleblower Actions

1. Definitions for purposes of this paragraph:

Covered Subcontractors and lower-tier subcontractors means those Subcontractors and lower-tier subcontractors with subcontracts exceeding \$5,000,000.

Employee Whistleblower action means an action filed by an employee in Federal or state court for redress of a retaliatory act by a Subcontractor and any administrative procedure initiated by an employee under 29 CFR Part 24, 48 CFR Subpart 3.9, 10 CFR Part 708 or 42 U.S.C. 7239.

Retaliatory act means a discharge, demotion, reduction in pay, coercion, restraint, threat, intimidation, or other similar negative action taken against an employee by a Subcontractor as a result of an employee's activity protected as a whistleblower activity by a Federal or state statute or regulation.

Settlement and award costs mean defense costs and costs arising from judicial orders, negotiated agreements, arbitration, or an order from a Federal agency or board and includes

compensatory damages, underpayment for work performed, and reimbursement for a complainant employee's legal counsel.

2. For costs associated with employee's whistleblower actions where a retaliatory act is alleged against a covered Subcontractor or lower-tier subcontractor, the DOE Contracting Officer, acting through the NREL Subcontract Administrator:
 - (i) May authorize reimbursement of costs on a provisional basis, in appropriate cases;
 - (ii) Must consult with the DOE Office of General Counsel, whistleblower cost point of contact, who will consult with other Headquarters points of contact as appropriate, before making a final allowability determination; and
 - (iii) Must determine allowability of defense, settlement and award costs on a case-by case basis after considering the terms of the subcontract, relevant facts and circumstances, including federal law and policy prohibiting reprisal against whistleblowers, available at the conclusion of the employee whistleblower action.
3. Covered Subcontractors and lower-tier subcontractors must segregate legal costs, including costs of in-house counsel, incurred in the defense of an employee whistleblower action so that the costs are separately identifiable.
4. If a DOE Contracting Officer provisionally disallows costs associated with an employee whistleblower action for a covered Subcontractor or lower-tier subcontractor, funds advanced by the Department may not be used to finance costs connected with the defense, settlement, and award of an employee whistleblower action.
5. Subcontractor defense, settlement and award costs incurred in connection with the defense of suits brought by employees under section 2 of the Major Fraud Act of 1988 are excluded from coverage of this section.